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SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

ANDRES SERRANO MEDINA

PETITIONER

VS.

THE UNITED STATES OF AMERICA,
COMMANDING OFFICER OF THE NAVAL STATION,
ROOSEVELT ROADS, PUERTO RICO
ANTILLES CONSOLIDATES SCHOOL SYSTEM

RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

ANDRES SERRANO MEDINA
PETITIONER
VS

UNITED STATES OF AMERICA

THE COMMANDING OFFICER, NAVAL STATION, ROOSEVELT ROADS, PUERTO RICO

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Andres Serrano Medina submits his case to this Supreme Court and respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the First Circuit.

I. QUESTIONS PRESENTED FOR REVIEW

Petitioner presents for review basic, fundamental questions of the conflict in rights between the authority of a military commanding officer to exclude civilians from his command, and the constitutional rights of the excluded civilians.

1. If a commanding officer bars a civilian from entering his command area, is his action within the jurisdiction of the federal courts when the affected civilian contests the bar order?
2. If the federal courts have jurisdiction to hear the controversy, can the court review the decision?
3. If the court can review the decision, must the review comply with "due process"?
4. If the court finds the decision of the commanding officer without support in the evidence, can the court award damages?
5. If the court finds the decision of the commanding officer without support in the evidence, can the court order the commanding officer to admit the civilian to the base?
6. If the criteria exists that only a "patently arbitrary and capricious" order can be reviewed by the court, how can the court determine if a decision were patently arbitrary or capricious except by hearing evidence?

These questions are central to the case here presented as questions that have been determined with conflicting results in different federal circuits that have been confronted with the controversy.

Decisions in the third, fifth and ninth circuits differ significantly from the first circuit decision in this case.

If this Supreme Court were to decide that the decision of the first circuit is correct, the petitioner contends that the decision in *Cafeteria Workers* is unconstitutional, and submits this contention as a question to review.

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III. TABLE OF AUTHORITIES

Cases cited:	Serrano vs. United States	709 F2° 104
	Tokar vs. Hearne	699 F2° 753
	Bridges vs Davis	443 F2° 970
	The Committee to Free the Fort Dix 38 vs. Collins	429 F2° 807
and	Cafeteria Workers vs. McElroy	284 F2° 187 81 SCt 1743

IV. OPINION BELOW AND JURISDICTION

Petitioner submits for review the decision and opinion of the US Court of Appeals for the first circuit in case No. 82-1702, the memorandum and order in that same case dated 13 June 1983, and the decision and opinion of the US Court of Appeals for the first circuit in case No. 84-1644, dated 27 March 1985. This latter case is the final decision after the remand of the first decision, and together constitute the final decision.

On 15 June 1985 petitioner requested an extension of time to file a petition for a writ of certiorari. This request was granted by Justice Brennan on 18 June 1985, granting an extension to 25 July 1985 to submit this petition.

Jurisdiction of this Supreme Court to hear this petition is granted by 28 USC 1254 as a review of a judgment of a United States Court of Appeals.

V. STATEMENT OF THE CASE

In January 1978, Andres Serrano Medina had worked for 15 years as a cook in the cafeteria of the Antilles Consolidated School System at Roosevelt Roads, Puerto Rico, as a non-

School System at Roosevelt Roads, Puerto Rico, a non-appropriated fund facility of the US Naval Station. He also owned and operated a taxi during non-school hours; this was licensed by the Public Service Commission of Puerto Rico and authorized by the base commander to operate on the Naval Station.

On the night of 8 January 1978, Serrano, accompanied by his brother, Jose Serrano Medina, carried a US Marine passenger from a local bar to the Marine barracks on the base. He entered the base showing his taxi ID card. His light blue taxi was in the repair shop so he was driving his wife's personal red Chevrolet.

As the taxi approached the Marine barracks, he was cut off by another car. Three men, later identified as Navy security agent Lykins, Alston and Stoner, approached the car and ordered everyone out. They body-searched all three, Serrano and his brother were clean, the Marine had three packets of marijuana. The agents asked Serrano to sign a release to search his car. He signed the release; they searched and declared it clean. Next the agents showed a paper bag they claimed to have found under the right side of the taxi. Serrano and his brother were asked if they knew anything about the bag, both denied any knowledge.

Serrano was asked for his ID card. As he gave his Navi taxi ID, the agent also asked for a second ID that he had noticed in Serrano's wallet. This was Serrano's ID as a cook. Entrance to the base is controlled by ID cards that specify areas and hours. Serrano legitimately had two cards for his two authorizations to be on the base.

The school ID had just been issued, his picture showed him with a full beard, just as he had that night. The taxi ID was a recent reissue of a two-year-old card that showed him to be clean shaven.

The agents confiscated both cards and turned Serrano to the Puerto Rico police, charging him as a drug distributor.

On 17 January, Serrano went with an attorney to ask the commanding officer to return his ID cards so that he might work while the charges in Puerto Rico courts were pending. He told the commanding officer that he knew nothing of the marijuana found on the Marine or the bag supposedly found under the car. The commanding officer refused to return the ID cards and refused to discuss while the court charges were pending. He also told Serrano that he was guilty of felony fraud against the United States because the ID cards were different.

On 31 March 1978 the commanding officer issued a permanent barment order.

In May the state case against Serrano was dismissed after repeated failure of the Navy security agents to appear to testify.

Meanwhile, in April 1978, Navy filed criminal charges of drug distribution against Serrano in US District Court. Unrelated to the earlier incident, these charges were based on statements by two white high school students at the base school where Serrano worked as a cook. They alleged that Serrano had sold marijuana to them, even though he had not been on the base for three months. Investigation in defense of Serrano showed that one of those students was himself actually the primary marijuana distributor in the school. Navy security agents had saved him from a beating by a customer that he had cheated. Under questioning, he named Serrano as his source, most likely to avoid the consequences of naming his actual source.

The student was named Stoner, he is the son of one of the agents who had arrested Serrano in the January incident.

This information was given to the US attorney, who shortly afterward requested dismissal of the case against Serrano, which was granted.

Understanding the facts of this case require identification of the main actors:

Andres Serrano Medina, plaintiff/petitioner
Jose Serrano Medina, brother of Andres, a disabled Vietnam veteran
Jose Medina, a known drug dealer who is a half-brother of Andres Serrano Medina and Jose Serrano Medina.
James Stoner, Navy security agent
Charles Alston, Navy security agent
Anthony Lykins, Navy security agent
Stoner Jr., high school student at the base.

At the time of this case, Navy was investigating drug sales on the base. According to official reports, on the night of Serrano's arrest, Navy was looking for a man called "Junior" who drives a red taxi. In the report of Serrano's arrest, it is claimed that Serrano was known as "Tole," which is correct, and further states that "Tole" is Spanish for "Junior." This is completely wrong, it also demonstrates that the Navy agents were illiterate in Spanish, in an area where Spanish is the primary language.

Navy security was looking for a red taxi; Serrano had a blue taxi, but that night he was driving his wife's red car, the only time he entered the base with a red car.

Serrano has a half-brother, Jose Medina, son of his mother before she married Serrano's father. Jose Medina is known as "Junior" and drove a red taxi. He was a known drug dealer, although he had never been charged or convicted.

It was obvious that the agents were looking for Jose Medina, Serrano's half-brother, on the night of 8 January 1978. This person was not the brother in the car, who was Jose Serrano Medina, nor was he Andres Serrano Medina, he was a completely different person.

Andres Serrano Medina has never been involved, in fact or by reputation, in any aspects of drugs. Since the incidents of 1978, which cost him his job as a cook and his taxi business, Andres Serrano Medina has declared his innocence of all criminal

charges and maintained that the Navy arrest action was directed against his half-brother, Jose Medina. No denial of this claim has ever been made, directly or indirectly, by Navy.

With both state and federal cases dismissed, Serrano requested the return of his ID cards so that he could return to work. The commanding officer refused, stating as a reason that Serrano was guilty of felony fraud against the United States because of the differences on the ID card pictures and because he was named Andres Serrano on one card and Andres Serrano Medina (Medina is his mother's name) on the other. The IDs were made by the Navy, and were at all times the property of the Navy.

With this final refusal of the commanding officer to lift the barment order, Serrano filed suit in US District Court with a claim for lost wages, reinstatement in his job and taxi business, and reversal of the barment order. The suit names as defendants the United States, the commanding officer, and the Superintendent of the school system.

Navy refused most discovery, except for a statement by the commanding officer that is in the record. It is a long statement within which he admits that he lied to Serrano about the reason for the bar order ". . . although my correspondence to plaintiff and his attorney indicated that the reason for his disbarment . . . was fraudulent possession of two ID cards . . . the real reason was that . . . although he was cleared of all charges at a court hearing . . . I was still convinced that he was selling marijuana . . ."

In US District Court, Serrano's claim against the commanding officer was dismissed because ". . . this court has no power to review a commanding officer's barment order . . ." This initial decision also dismissed the case against the school superintendent.

Andres Serrano Medina appealed to the United States Court of Appeals for the First Circuit. The first circuit affirmed the dismissal against the commanding officer on an Order and Opinion dated 10 May 1983, reported at 709 ° 104. The first

circuit decision cites *Cafeteria Workers vs. McElroy, 81 SCt 1743,* ". . . *the language in Cafeteria Workers* indicates that the factual basis behind the commander's allegations is not subject to judicial scrutiny . . . to delve into the truth or falsity of the facts behind this exclusion would be to require the very hearing that appellant has been found not entitled to. . . " 709 F2° at 109.

The Order and Opinion of the first circuit contained significant errors of fact, errors which formed the basis for the affirmation of the original District Court decision. This original Order and Opinion is included in the appendix as originally issued. Serrano filed for rehearing, pointing out the following errors of fact in that Order and Opinion and arguing that if the Court had not confused the identities of Jose Serrano Medina and Jose Medina it would not have decided against appellant in his claim that the incident of the Marine and that of the two high school students were both cases of mistaken identity and that the commanding officer's barment order was completely wrong:

Error No. 1 - on page 2 of the opinion it reads "His half-brothere, Jose Medina, was also in the car."

This is not true, the Navy agrees that his *brother*, Jose Serrano Medina, was in the car.

Error No. 2 - on page 16 of the opinion read "The circumstances were plainly suspicious; Serrano was accompanied in his taxi not only by a passenger who possessed marijuana but by a half-brother widely identified as dealing in drugs who apparently tried to get rid of some marijuana when the stop occurred."

This is not true. It was not the drug-dealing half-brother in the car but the disabled Vietnam veteran brother.

Error No. 3 - on the same page 16 read "While a taxi driver might not always be expected to vouch for every passenger, the presence of his half-brother in the taxi puts matters in a different light."

> This squarely bases the decision on the presence of a drug-dealing half-brother in the taxi, an error which founds the decision on an untrue fact.

The US Court of Appeals for the First Circuit denied the petition for rehearing and changed the original Opinion in Memorandum and Order dated 13 June 1983, reproduced entirely in the appendix of this petition.

The Memorandum amended the opinion as follows:

1) The sentence beginning on line 13 of page is changed to "His brother, Jose Serrano Medina, was also in the car."
2) On page 16, lines 8, 9 and 10 from the bottom are changed to "passenger who possessed marijuana but by his brother, who apparently tried to get rid of some marijuana when the stop occurred."
3) In line 6 from the bottom of page 16, "half-brother" is changed to "brother."

The amendments appear in the published record 709 F2° at page 105, line 28, page 119(7), line 15, and page 110(7), line 24, respectively.

These changes destroy the reasoning of the US Court of Appeals. The brother in the car was not identified as dealing in drugs, he is a disabled Vietnam war veteran with an outstanding record of service to his country. This substitution of a known drug dealer for an honorable brother removes completely from the first circuit's decision the "adequate support" credited to the Navy position.

Petitioner presents this to show that if he had been given due process it is quite probable that the barment would have been reversed.

The first circuit opinion also remanded the case to District Court to review the case against the school superintendent. The US District Court then dismissed the case against the school superintendent. Andres Serrano Medina returned to the US Court of Appeals for the first circuit, which affirmed the final dismissal on 27 March 1985.

Now the only recourse for justice is to the US Supreme Court.

VI. REASONS THAT THE SUPREME COURT SHOULD HEAR THIS CASE

The Supreme Court should hear this case for the following reasons:

1. The case presents a controversy over a conflict of rights that are in themselves fundamental, the constitutionally guaranteed right of every individual to due process, and the right and duty of the military to defend the United States.
2. The US Supreme Court leading case of *Cafeteria Workers* is cited as controlling by the courts that have heard cases over the authority of a commanding officer to bar civilians from his command and the right of those persons who have been barred. The various circuit courts of appeals have decided cases with significant variation in the interpretation of the criteria to be applied as it is defined in *Cafeteria Workers*. These differences between the circuits have caused the resulting judgments to vary depending on the circuit of venue. This difference must be resolved by the Supreme Court in this case to ensure even justice to all.

VII. ARGUMENT

Petitioner presents the following arguments:

- *that the US court of Appeals for the First Circuit, in the case here presented for a writ of certiorari, has interpreted the leading case of *Cafeteria Workers* in an unconstitutional way that is in conflict with the US Supreme Court criteria
- *that the interpretation of the US Court of Appeals for the First Circuit conflicts with interpretations of the same case in the third, fifth and ninth circuits
- *that if this Supreme Court determines that the interpretation of the First Circuit is correct, then the decision of *Cafeteria Workers* is itself inconstitutional

First Circuit interpretations: in its Opinion and Order in the case of Serrano, the First Circuit finds that the discretion of the commanding officer is absolute, that a decision by a commanding officer to bar a civilian is not subject to judicial scrutiny, and that "... to delve into the truth or falsity of the facts behind the exclusion would require the very hearing that the appelant has been found not entitled to ..." *Serrano vs United States, et al.* 709 ° at 109.

The First Circuit found that Andres Serrano Medina had been denied due process but decided that the District Court was correct in determining that "... appelant's involvement in drug sales is adequately supported ..." This decision loses all logic when both the District Court and the Circuit Court find factual support for the decision because the "drug-dealing" half-brother was present in the taxi, and then maintain that conclusion when it is pointed out that official Navy reports of the incident state that the other person in the taxi was the disabled Vietnam veteran brother, not the drug-dealing half-brother.

In *Cafeteria Workers* the Supreme Court decided that the court could accept the reason given by the commanding officer that the barment was for "failure to meet security requirements," and that the court should not inquire into the facts that led the commanding officer to reach that decision.

In Serrano's case, the court has been made aware of two sets of facts. One set of facts shows that the person barred is not the person that the commanding officer was intending to bar; the other set of facts is a series of allegations proven false, suspiciously akin to a coverup of incompetent or discriminatory security agents. The commanding officer is not claiming to withhold the facts, he presents his reasons and his facts.

Petitioner respectfully argues that if the commanding officer declares the facts that supported his reasoning, he waives any right to immunity from judicial scrutiny.

This position does not impugn the authority of the commanding officer to bar entrance to his base, nor does it contest the immunity of the decision to judicial review when the commanding officer states that his decision is based on security interests. But once conflicting reasons, different sets of facts, are presented to the court, there is a right to due process to determine the truth.

Petitioner submits that the restriction of judicial review imposed by *Cafeteria Workers* is set forth in that decision as being quite narrow, intended only to place limits within the pinpointed issue of security.

Therefore, based on the record, the interpretation of the First Circuit in this case does not conform to the criteria of *Cafeteria Workers* and actually violates the constitutional protection retained in *Cafeteria Workers* and must be reversed.

Conflict with other circuits: in Serrano's case, the court found that a barment decision is not subject to judicial review, confirming the District Court decision to deny all due process. In the Opinion and Order the court stated that with respect to the appelant's contention that he had received no due process, no notice or hearing, "... it is quite clear that he received neither..." 709 F2° at 108.

The US Court of Appeals for the *Fifth Circuit*, citing *Cafeteria Workers*, found that a commanding officer's decision to bar a civilian was supported by the evidence, after the District Court had conducted a *trial on the merits*. *Tokar vs Hearne* 699 F2° 753, at 755.

The Fifth Circuit Court permits judicial review, the First Circuit does not. This means that if Andres Serrano Medina lived in the fifth circuit instead of the first circuit, he would quite probably still be a federal employee.

The US Court of Appeals for the *Ninth Circuit* decided that "... although the scope of review in cases such as this involving military matters is extremely limited, that does not mean that any military action is beyond the reach of the courts. Therefore, in a strict sense the orders before us are not nonreviewable. The phrase nonreviewability is properly ascribed to the scope of the review, rather than the jurisdiction to review ... *Bridges vs Davis* 443 F2°, Ninth Circuit, 1971.

The position of the ninth circuit is contrary to that of the first circuit where judicial review is effectively denied.

In the *Third Circuit*, the US Court of Appeals reviews the dismissal of a complaint that challenged the decision of the commanding officer to bar civilians. The court states "... Since this came to as a result of a dismissal of the complaint, we assume for the purpose of review that the facts alleged in the complaint are true ..." *The Committee to Free the Fort Dix 38 vs Collins*, 429 F2° 807.

In Serrano, the First Circuit considers it is reviewing a summary judgment, because "... these conclusions are based ... in part on submissions outside the pleadings ..." and that therefore we may affirm "... only if, looking at the record in the light most favorable to the appelant, there is no genuine issue of material fact ..."

Andres Serrano Medina's claim of mistaken identity was raised at every opportunity, particularly in the written and oral arguments opposing summary judgment in District Court, and the brief and oral arguments before the First Circuit. Based on these submissions in the record, the First Circuit could not have looked at the record in the light most favorable to appelant, did not consider for purpose of review that the facts shown by appellant are true. This constitutes a decision as to what 'facts' to use to decide the case. A decision as to which 'facts' to use is a decision that is contrary to the position of the third circuit.

Petitioner presents these cases to show that Serrano would most probably have been reviewed to determine the validity of the commander's decision if it had occurred in the third, fifth or ninth circuits.

Presuming that his claim of mistaken identity prevailed, Serrano would still have his full time job as a cook and his business as a taxi.

These inconsistencies destroy the integrity of our federal system of justice and must be resolved.

Cafeteria Workers

In *Cafeteria Workers* the Supreme Court draws a line between the barring of a civilian with a constitutional right violated by the barment, and the civilian with no such right. In both the court upholds the authority of the commanding officer to bar but limits judicial scrutiny of the barment order to that person who possessed a right that was violated. However, in the real world, such review has been quite limited, with no significant difference between the review accorded the two classes of civilians.

Cafeteria Workers describes a criteria of flexibility in determining the due process rights, and then decides that for Rachel Brawner, the cafeteria cook of that case, that no due process is required.

Petitioner notes that *Cafeteria Workers* was decided with subtle but powerful external considerations that are not apparent from the text of the decision.

The plaintiff/appellant in *Cafeteria Workers* was the AFL-CIO, not the cook who had been deined entrance to the base. The issue was not only the reviewability of the bar order, but was as much a contest between the Navy and AFL-CIO as to who would be the boss on the military base.

After the bar order, the union instituted arbitration against the contractor employer, resulting in a decision clearing the contractor because he had not terminated her, and therefore the worker's grievance was not with the employer. Circuit Court Judge Danaher describes the situation to illustrate the thrust of the *Cafeteria Workers* litigation:

> "One of the arbitrators, Samuel Jaffe, Esq., of the firm of Jaffe and Danau, dissented from the arbitration award. He argued in his dissent against the determination by those in the command that Mrs. Brawner did not meet "... basic requirements and thus her pass was revoked..." He pointed out that there is ". . . NO GREATER THREAT TO THE VERY EXISTENCE OF A LABOR ORGANIZATION, THAN TO PERMIT AN EMPLOYER THE UNILATERAL ACTION IT HAS INDULGED IN HERE . . ." (emphasis added by the Appeals Court in banc) *Cafeteria Workers, et al,* at 284 F2° 187.

The Appeals Court sitting in division of three judges adopted the position of Mr. Jaffe that the Navy could not unilaterally dismiss an employee, that the union had to participate. Voting two to one, the Court reversed the District Court dismissal. Defendant United States then requested a rehearing en banc of the three-judge decision. This resulted in a five to four vote to reverse the earlier two-to-one vote of the Appeal sitting division.

The most pertinent part of that decision is in Judge Danaher's concurring opinion: (285 F2° 187)

> "never to my knowledge had there been such a challenge to the Government's right to protect its own Navy installations."

It is clear that the basic issue in *Cafeteria Workers* was not the civil rights of the cafeteria cook, the issue was whether the Government or the union would decide who works on a Government installation.

Petitioner contends that the influence of the union pressure distorted the case decision beyond the civil rights issue.

Within this perceived context of *Cafeteria Workers*, petitioner argues that a correct interpretation of *Cafeteria Workers* and its progeny is that the power of the commanding officer to bar civilians is essentially absolute, but it is always subject to judicial scrutiny to ensure that the decision is fair and reasonable.

In this context, petitioner believes that *Cafeteria Workers* is constitutional. If, however, the Supreme Court decides that the commanding officer is shielded from judicial scrutiny in all but the most blatant, scandalous examples of injustice, then the decision in *Cafeteria Workers* is not constitutional. A single exception would be the claim of a commanding officer that the action was founded on reasons of security. Any order not so based should be considered as an action of police power, and as such subject to the same constitutional restraints as any police action.

VIII. *Conclusion*

Petitioner contends that the court decisions in at least four circuits, the first, third, fifth and ninth, differ substantially, that the same case heard in these districts would result in different judgments and that disparate results are repugnant to our federal system of justice.

Petitioner further contends that a correct interpretation of the position of the federal court on barment controversies is that unless the case is frivolous on its face, the only procedure to determine the impugnation of a barment order is trial on the merits to determine if a case exists.

If this position conflicts with the criteria of *Cafeteria Workers*, then the *Cafeteria Workers* position is on the wrong side of the constitution, and must be revoked or modified.

FOR ALL THESE REASONS petitioner most respectfully submits that this case illustrates a serious discrepancy between the circuit courts on this important issue and that this case is a propitious set of facts quite apt to utilize in resolving these differences.

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I certify that copies of this petition have been sent by pre-paid mail to the Solicitor General of the United States.